

1 **NATIONAL LAWYERS GUILD-CENTRAL ARIZONA CHAPTER**

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11 **IN THE SUPREME COURT**

12 **STATE OF ARIZONA**

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PETITION TO AMEND ER 8.4,  
RULE 42, ARIZONA RULES OF  
THE SUPREME COURT

Supreme Court No. R-110033

**Comment in Support of Petition to  
Amend ER 3.8 of the Arizona Rules of  
Professional Conduct**

**INTRODUCTION**

The National Lawyers Guild-Central Arizona Chapter (NLG-AZC), pursuant to Rule 28, *Rules of the Arizona Supreme Court*, offers its comments in support of the proposed Amendment to **ER 3.8**, Rule 42, *Rules of Professional Conduct*, and urges the Court to adopt it.

NLG-AZC is the local affiliate of the oldest and most extensive network of public interest and human rights advocates working within the legal system.

1                   **THE PROPOSED RULE CHANGE PROVIDES GUIDANCE TO**  
2                   **PROSECUTORS WHERE NONE EXISTS NOW**

3                   **ER 3.8** details the *Special Responsibilities of a Prosecutor* in a criminal  
4 case. The amendment elaborates on the prosecutor's responsibilities. She or he is not an  
5 advocate for an accused, but represents the government, “whose interest in a criminal  
6 prosecution . . . is not that it shall win a case, but that justice shall be done.” *Berger v.*  
7 *United States*, 295 U.S. 78, 88 (1935). More recent Supreme Court<sup>1</sup> and Arizona<sup>2</sup> case  
8 law support this guidance.  
9

10                  However, the Arizona Rules of Professional Conduct are glaringly silent on  
11 the duties of prosecutors if and when they are faced with “new, credible and material  
12 evidence,” that creates “a reasonable likelihood that a convicted defendant did not  
13 commit,” the offense of conviction. The amendment to the Ethical Rule remedies the  
14 problem.  
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16                  NLG-AZC joins in previously-posted comments in support of the  
17 amendment, including those from Petitioners themselves in their Petition and Response;  
18 Arizona lawyers who include retired justices of this Court and former Attorneys General;  
19 Arizona Attorneys for Criminal Justice (AACJ), and the ABA's Center for Professional  
20 Responsibility Policy Implementation Committee.  
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24                  <sup>1</sup> *E.g. Imbler v. Pachtman*, 424 U.S. 409, 428-429 (1976)

25                  <sup>2</sup> *Canion v. Cole*, 210 Ariz. 298, 299, 115 P.3d 1261, 1262 (2005)  
(dictum), *In re Peasley*, 208 Ariz. 27, 34-35, 90 P.3d 764, 772-773 (2004).

1                   **PROSECUTORIAL OBJECTIONS ARE WITHOUT FOUNDATION**

2                   NLG-AZC cannot understand how or why the Maricopa, Pima and Yavapai  
3 County Attorneys and their umbrella organization, APAAC, oppose the amendment  
4 which, as petitioners note, only would provide guidance to solving dilemmas, would  
5 make prosecutors' jobs easier, and would insulate them from ethical complaints.  
6

7                   In fact, the prosecutors raise objections such as that the amended rule would  
8 cause prosecutors to file petitions for post-conviction relief<sup>3</sup> and dilatory comments such  
9 as, "what is meant by 'new, credible and material evidence?'"<sup>4</sup> As every prosecutor  
10 knows, or should know, terms like "new," "credible," and "material" are defined in the  
11 Rules of Evidence or are determined by the courts as a matter of law. Objections on these  
12 grounds are baseless.  
13

14                   In the face of incredible numbers exonerations in Arizona and nationwide,  
15 and especially the Arizona case of Ray Krone--the Maricopa County Attorney's claim  
16 that the "problem [of suppressing post-conviction exculpatory evidence] had not been  
17 shown to exist in Arizona"<sup>5</sup> demonstrate the need for the proposed change to the Rules.  
18 Had the proposed amendment been adopted sooner, perhaps the intransigence that  
19 delayed relief and release for Mr. Krone would have been avoided<sup>6</sup>.  
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<sup>3</sup> Sheila Polk for APAAC p. 3.

23                   <sup>4</sup> *Id.*

24                   <sup>5</sup> *And see* Polk at 2.

25                   <sup>6</sup> *See* Petitioners' Response at 6-7 and their Appendix.

1 The Pima County Attorney claims, *inter alia*, “the duty to investigate places  
2 a heavy burden on prosecutors.”<sup>7</sup> Yet she does not complain about the prosecutor's  
3 underlying duty to investigate before filing charges, *e.g. see*, **ER** 3.8(a). Perhaps, as the  
4 Pima County Attorney claims<sup>8</sup>, her office is capable of dealing with such problems<sup>9</sup> but  
5 the proposed amendment would provide uniform guidance to the twelve Arizona County  
6 Attorneys' offices, their hundreds of deputies and the U.S. Attorney and his assistants.  
7

### 8 **CONCLUSION**

9 In the interest of justice, fairness and due process, for the foregoing reasons  
10 and those stated by other supporters, NLG-AZC respectfully urges this Court to adopt the  
11 proposed amendment.  
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13 RESPECTFULLY SUBMITTED on this 18<sup>th</sup> day of May, 2013.  
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15 ***The National Lawyers Guild – Central Arizona Chapter***

16 /s/ Gail Gianasi Natale  
Gail Gianasi Natale

17 /s/ Dianne Post  
Dianne Post

18 /s/ Kevin Heade  
Kevin Heade  
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23 <sup>7</sup> Barbara LaWall p. 2, *and see* Polk at p.3.

24 <sup>8</sup> *Id.* at 4.

25 <sup>9</sup> *Peasley*, for example, belies this claim.